

STATE OF MICHIGAN
COURT OF APPEALS

KEVIN D. MYERS, Personal Representative of
the ESTATE OF INEZ MAE MYERS, Deceased,

UNPUBLISHED
December 15, 2005

Plaintiff-Appellant,

v

MARSHALL MEDICAL ASSOCIATES, P.C.,
JAMES G. DOBBINS, M.D., THOMAS D.
DOBBINS, M.D., WILLIAM H. DOBBINS,
M.D., and TENDERCARE OF MARSHALL,

No. 262590
Calhoun Circuit Court
LC No. 03-000161-NH

Defendants-Appellees.

Before: Donofrio, P.J., and Zahra and Kelly, JJ.

PER CURIAM.

Plaintiff appeals from the trial court's order granting summary disposition to defendants pursuant to MCR 2.116(C)(7). The trial court dismissed this wrongful death medical malpractice action finding that it was barred by the statute of limitations. Because the complaint filed as captioned was not brought by the personal representative of the decedent's estate and the action therefore constitutes a nullity, we reverse and remand to the trial court for entry of dismissal without prejudice.

We review de novo a trial court's decision to grant a motion for summary disposition. *Ousley v McLaren*, 264 Mich App 486, 490; 691 NW2d 817 (2004). "With regard to a motion for summary disposition pursuant to MCR 2.116(C)(7), this Court reviews the affidavits, pleadings, and other documentary evidence presented by the parties and 'accept[s] the plaintiff's well-pleaded allegations, except those contradicted by documentary evidence, as true.'" *Young v Sellers*, 254 Mich App 447, 450; 657 NW2d 555 (2002), quoting *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 681; 599 NW2d 546 (1999) (alteration by *Young*). We review questions of statutory interpretation de novo on appeal. *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

The substantive facts in this case are not in dispute. The alleged medical malpractice occurred in April 2000. Plaintiff's decedent died on May 12, 2000. Kevin D. Myers was appointed personal representative of the decedent's estate on July 25, 2000, and issued letters of authority. A notice of intent was not served within the period of limitations of actions.¹ On January 25, 2002, the probate court terminated Kevin D. Myers' authority as personal representative pursuant to administrative closing terminating the personal representative's authority.² The instant complaint was filed on January 15, 2003, without benefit of a duly appointed personal representative. On October 21, 2004, plaintiff filed his motion for voluntary dismissal without prejudice, amendment of caption, substitution of parties, and such other relief. The motion for voluntary dismissal was not directly addressed by the trial court, but, it was referenced in the order denying plaintiff's motion for reconsideration of defendants' granted motion for summary disposition on the basis of expiration of the period of limitation of actions pursuant to MCR 2.116(C)(7).

Plaintiff argues that summary disposition was improper because the statute of limitations had not expired for the reason that plaintiff's cause of action was timely filed based on the operation of the wrongful death saving provision, MCL 600.5852. Defendants counter that plaintiff misinterprets MCL 600.5852 when she suggests that the three-year ceiling period may be used to create an effective five-year statute of limitations in a qualifying wrongful death/medical malpractice action.

We do not decide either of the parties contentions. Because the action was not properly commenced with a personal representative acting under letters of authority and there was no substitution of personal representative, the matter should not have gone forward to decision on the merits. Pursuant to MCL 600.2922(2), a wrongful death action shall be brought by the personal representative of the estate of a deceased person. *Smith v Henry Ford Hosp*, 219 Mich App 555, 557-558; 557 NW2d 154 (1996). Here, Kevin Myers' authority to represent decedent's estate was revoked and the estate closed on January 25, 2002, nearly six months before the complaint was filed on June 15, 2003. In the absence of a valid personal representative, the action should have been dismissed. *Id.* at 561.

¹ On July 23, 2002, the estate's attorney served a notice of intent to file a claim pursuant to MCL 600.2912b and filed an initial complaint on January 15, 2003. These facts are irrelevant to our analysis because the notice of intent was not served within the period of limitation of actions. *Waltz v Wyse*, 469 Mich 642, 651; 671 NW2d 813 (2004).

² Plaintiff's counsel notes in his factual recitation the administrative closing and termination of personal representative authority effective January 26, 2002, but did not attach the probate order as an exhibit to his pleadings. This Court has determined that the probate order of administrative closing and termination of personal representative authority was entered on January 25, 2002.

Reversed and remanded to the trial court for entry of dismissal without prejudice. We do not retain jurisdiction.

/s/ Pat M. Donofrio

/s/ Brian K. Zahra

/s/ Kirsten Frank Kelly